71-1390

FILED
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In The

Supreme Court of the United States

October Term, 1971

No.

PHILIP BENTER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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South River, N.J. (201) 257-6850 New York, N.Y. (212) 565-6377 Philadelphia, Pa. (215) 563-5587

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Philip Benter petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered March 28, 1971 (Docket No. 71-2053).

The judgment affirmed the conviction for conspiracy to receive a bribe, as a government employee, after a jury trial in the Eastern District of New York (No. 70 CR 112).

Opinion Below

The opinion of the Court of Appeals, not yet reported, is set forth in the Appendix.

Jurisdiction

The jurisdiction of this Court to review the judgment of the Court of Appeals is granted pursuant to 28 U.S.C. 1254(1).

Constitutional Provisions Involved

The Fifth Amendment to the United States Constitution, and its due process clause, is well known to this Court.

Issues Involved

1. Did the Court of Appeals err, contrary to the teachings of Berger v. United States, 295 U.S. 78, 88 (1935), when it held that the prosecution summation, though clearly improper and prejudicial, did not constitute reversible error?

2. Did the Court of Appeals err, contrary to the opinion of this Court in Viereck v. United States, 318 U.S. 236, 248 (1943), when it held that the failure of defense counsel to interrupt a clearly improper and prejudicial prosecution summation, constituted a waiver, when the trial judge directed counsel not to interrupt each other, and counsel objected to the summation at its completion?

3. Did the Court of Appeals err in holding that a defendant, a government employee, charged with the substantive offense of receiving bribes from

employees of a government contracting firm, may also be charged with conspiracy with these employees to receive the bribes?

4. Is it error for the prosecution, when charging a substantive offense which necessarily involves an illegal agreement between two or more persons, to charge in addition a conspiracy count, based on the very same illegal agreement?

Preliminary Statement

Petitioner Philip Benter was convicted of conspiracy to accept a bribe, as a government official, in violation of 18 U.S.C. 371 and 18 U.S.C. 201(c).

During the period 1968 and 1969 Benter was a military contract specialist with the United States Air Force Procurement Division at Edgewood Arsenal, Maryland.

S. Tepfer & Sons, Inc., was a contracting firm that had received eight procurement contracts to furnish seven million dollars worth of military hardware.

Two principals, an employee, and an associate of the Tepfer Company testified they paid Benter a substantial sum for his assistance in obtaining the contracts for Tepfer.

Benter testified, and denied any wrongdoing. In addition each of the contracting officers and contract specialists who were responsible for the contracts in question testified in his behalf. All agreed that Benter did not have the power to make the award of the contracts to Tepfer, nor did he

seek to influence those who did have the authority. All who were asked agreed that Benter's reputation for honesty and veracity was the highest.

The government's case consisted solely of accomplice testimony, and was not corroborated by independent non-tainted evidence.

As the Court of Appeals wrote:

> "The heart of the case involved weighing the credibility of appellant, a long-time military contract specialist at Edgewood Arsenal, Maryland, against that of four Government witnesses — Barry and Leo Tepfer, the principals of a Government contractor (S. Tepfer & Sons, Inc.), Selig Chervin, the contract administrator for the Tepfer firm, and Jerome Migdal, a friend of appellant's and an acquaintance of Chervin. For testifying against Benter the Tepfers received formal immunity from prosecution; at the time of trial Chervin was still in business and Migdal was still a Post Office employee."

In summation the prosecution argued to the jury (see opinion, page 5):

> "...if you think for one minute that this is a frame, that the United States Attorney's office and the FBI got together with the so-called four crooks and paraded them in here to frame this defendant, you should acquit him."

Later the prosecutor repeated this argument to the jury (see footnote 3 of opinion):

> "...if they all got together with us, and I mean the United States Attorney and with the FBI, to frame him, well, then go ahead and acquit him."

During the summation the prosecutor made at least nine separate references to "Honest Phil" — "honest Phil Benter" — "is the only one who told the truth."

In its opinion the Court of Appeals wrote:

> "The Government replies — objected to after, but not during, the summation — consisted in the main of two lines of argument, neither put in such a way as to be unobjectionable. First, counsel stated that if the jury thought 'for one minute that this is a frame, that the United States Attorney's office and the FBI got together with the so-called four crooks and paraded them in here to frame this defendant, you should acquit him.' Secondly, he mocked the defense argument that 'honest Phil Benter' is 'the only one who told the truth.' In this respect, the prosecutor made at least nine separate references to 'Honest Phil.'
>
> The references to a 'frame,' while hardly expressed in language appropriate to the proper exercise of the prosecutorial function — which it will be remembered is not to win a case, but to see that justice is done — did serve to put, as appellant claims, the prestige of the United States Attorney's office and the FBI behind the Government's case. Ordinarily this is improper. See United States v. Puco, 436 F.2d 761, 762

(2d Cir. 1971) (2-1 decision). Here, however, the defense brought this line of argument on itself by the summation recounted above and particularly by the following unmistakable suggestion:

> What about the other two? Chervin and Migdal. Well, they denied they got immunity, but you saw them here and they admitted they had not been indicted; no charges have been filed against them. They have not been prosecuted. Nothing has happened. Chervin is still in business, Migdal is still working for the United States Government as a mailman.
>
> You can decide for yourselves whether or not there is an agreement.
>
> They won't be prosecuted; they haven't been.

The above defense point insinuated that there was an agreement between the Government and Chervin and Migdal for them to testify and, by implication, the plentiful references to the Government's witnesses being 'crooks' and 'poor liars' constituted a charge that there was a 'frame' of the defendant. To this argument by inference the Government was entitled to reply and, as Judge Goodrich put it, "...some latitude must be given to lawyers' language in a hard fought case.' United States v. Kravitz, 281 F.2d 581, 586 (3rd Cir. 1960), cert. denied, 364 U.S. 941 (1961) (footnote omitted). The form in which the reply is cast, if not objected to, generally is not plain error. United States v. Socony-Vacuum Oil Co.,

310 U.S. 150, 238-39 (1940); United States v. Isaza, supra, slip opinion at 1433.

But the numerous references to 'Honest Phil' are a horse of a different color. To be sure, the defense was that appellant had told the truth, and appellant, the evidence showed, had lied in one clear instance. But a federal court prosecution does not call for the flinging of first-name epithets at a defendant that might be commonplace in a second-rate movie or television script. This is beneath the dignity of the United States Attorney's office and of the United States as a sovereign. 'Cases brought on behalf of the United States should be conducted with a dignity worthy of the client.' United States v. Sober, 281 F.2d 244, 251 (3rd Cir.) (Biggs, C.J., and Hastie, J., concurring), cert. denied, 364 U.S. 879 (1960).

We do not find justification for the prosecutor's remarks in the case law.

* * *

We think the prosecutor's conduct was improper but in the circumstances of this case it did not constitute reversible error because there was ample evidence to justify conviction and Benter had indeed lied in reference to the payment for his third car."

Counts one to eleven had charged Benter with the substantive offenses of receiving a bribe in his employment as a government official (18 U.S.C. 201[c]). At the close of the government's case, the district court dismissed each of these counts

because of the prosecution's inability to establish by evidence venue within the Eastern District of New York.

Count twelve charged a conspiracy (18 U.S.C. 371) between Benter and the Tepfer employees to violate the anti-bribery statute (18 U.S.C. 201[c]). On this count alone Benter was convicted.

The defense had argued that according to United States v. Sager, 49 F.2d 725, 727 (C.A. 2, 1931), a defendant may not be charged with conspiracy, when the underlying substantive offense necessarily involves an illegal agreement between two or more persons (as opposed to a substantive offense which can be committed by one person alone without an illegal agreement with anyone else).

Sager had been cited by approval by this Court in Gebardi, 287 U.S. 112, 121-122, footnote 6 (1932).

In rejecting this argument the Court of Appeals wrote:

> "United States v. Smolin, 182 F.2d 782, 786 (2d Cir. 1950), is an effective answer to the argument that, since the substantive crime necessarily involves a concert of action, there can be no conspiracy charge, United States v. Sager, 49 F.2d 725, 727 (2d Cir. 1931), for here the agreement involved more participants than were necessary for the commission of the substantive offense. Moreover, the substantive counts were dismissed after jeopardy attached."

Reasons for Granting the Writ

The opinion of the Court of Appeals recognized that the prosecution summation was improper and prejudicial — "we think the prosecutor's conduct was improper . . . we find no justification for the prosecutor's remarks . . . the reference to a 'frame' . . . did serve to put, as appellant claims, the prestige of the United States Attorney's office and the FBI behind the government's case. Ordinarily this is improper . . . a federal court prosecution does not call for the flinging of first-name epithets at a defendant that might be common place in a second-rate movie or television script."

The Court of Appeals recognized, but did not apply the proper legal standard ". . . the proper exercise of the prosecutorial function — which it will be remembered is not to win a case, but to see that justice is done — this is beneath the dignity of the United States Attorney's office and of the United States as a sovereign — cases brought on behalf of the United States should be conducted with a dignity worthy of the client."

As such the opinion of the Court of Appeals is in conflict with the opinion of this Court in Berger v. United States, 295 U.S. 78 (1935). In Berger, in reversing a conviction because of an improper prosecution summation, this Court wrote (295 U.S. at 88):

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all;

> and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.
>
> "It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."

Footnote 2 of the Court of Appeals' opinion recognized that defense counsel objected to the prosecution summation only at its completion:

> "Preliminarily, it should be noted that appellant did not object to the prosecution argument as it was being made. This is attributed by appellant to the trial judge's direction to counsel 'not to interrupt the other's summation.' What the court did ask, however, was that there be no interruption 'unless there is the clearest of provocation for it.' Evidently trial counsel thought such provocation lacking."

Later the Court of Appeals wrote:

> "The Government replies - objected to after, but not during, the summation - . . ."

Finally the Court of Appeals stated:

> "The form in which the reply is cast, if not objected to, generally is not plain error."

In holding that defense counsel waived his right to complain of the prosecution summation by not interrupting it at the time, but waiting to its completion (as directed by the trial court), the Court of Appeals applied an unduly harsh waiver standard. Defense counsel risked certain admonition if he did interrupt — he was presented with a Hobson's choice.

In any event, the failure to object at all, did not deter this Court from reversing a conviction, because of an improper prosecution summation, in Viereck v. United States, 318 U.S. 236 (1943). Chief Justice Stone wrote (318 U.S. at 248):

> "We think that the trial judge should have stopped counsel's discourse without waiting for an objection."

We are living at a time when the trial courts (both federal and state) are becoming concerned about the courtroom behavior of counsel — both prosecution and defense. Perhaps a little more concern has been expressed about the misdeeds of some defense counsel. However government attorneys are also expected to behave. After all they present a case in the name of the sovereign herself — the United States of America.

At this time it is in order for this Court to deliver the message loud and clear — prosecution attorneys are expected to present their cases in a fair and dignified manner — prosecution misconduct just will not be tolerated — summations are only an opportunity for prosecutors to review the evidence, and not to engage in false claims, sarcasm, and name calling — the government must toe the mark in the area of law enforcement and prosecution.

Actually the issue posed by the relatively old case of United States v. Sager, 49 F.2d 725, 727 (C.A. 2, 1931) is unique and somewhat off the beaten path. Surprisingly it has appeared in very few cases. Apparently only the Second Circuit has actually written on the issue.

Sager holds that in a charge, such as bribery, where the substantive offense necessarily involves an illegal agreement between two or more persons, the defense cannot also be charged with conspiracy to commit that substantive offense. Otherwise the defendant would be in effect charged twice with the same illegal agreement.

Sager was cited with approval by this Court in Gebardi v. United States, 287 U.S. 112, 121-122, footnote 6 (1932). The preliminary agreement between the parties to commit an offense that requires cooperative action is not an indictable conspiracy.

As such it is the conspiracy charge, not the substantive charge, which must yield.

In United States v. Smolin, 182 F.2d 782, 786 (C.A. 2, 1950), the Second Circuit held that Sager

was applicable to a situation involving only persons who were necessary to the commission of the substantive offense. If the defendant on trial conspired with others who were not necessary to the commission of the substantive offense, then the Rule of Sager did not apply. Thus if a defendant conspired with one who was neither a giver nor a receiver of a bribe, Sager just was not applicable.

It was not the number of persons who were involved — it was the role each played that counted. In Sager four persons were involved — three gave a bribe to the fourth.

In our case the evidence showed there were four bribe givers and one bribe taker. Each of the four testified he gave a bribe on at least one occasion to Benter (Chervin many times, Leo Tepfer several times, Migdal once, Barry Tepfer, president of Tepfer Company was actually present when Chervin and Les Tepter gave a bribe).

The Court of Appeals was in error when it wrote:

> "United States v. Smolin, 182 F.2d 782, 786 (2d Cir. 1950), is an effective answer to the argument that, since the substantive crime necessarily involves a concert of action, there can be no conspiracy charge, United States v. Sager, 49 F.2d 725, 727 (2d Cir. 1931), for here the agreement involved more participants than were necessary for the commission of the substantive offense. Moreover, the substantive counts were dismissed after jeopardy attached."

No other Circuit nor has this Court dealt with this problem. Should the Rule of Sager be limited to only a two man situation — should it be limited only to actual participants (no matter how many) as long as each fulfills the role of a giver or receiver of the bribe — or should there be no limitation?

Nor should the fact that the trial court dismissed the substantive counts at the completion of the government's case alter the situation. If the defense is correct, the conspiracy count was invalid right from the inception when the indictment was filed, and certainly from the time when the trial actually commenced, and jeopardy attached. The conspiracy count should have been dismissed (or never filed) long before the substantive counts were dismissed.

Apparently bribery prosecutions are becoming more common place these days. The issue posed by this last point could effect other cases if prosecutors decide to press for both substantive and conspiracy indictments and convictions. It may be appropriate at this time for this Court to clarify the rules.

Conclusion

The petition should be granted.

Respectfully submitted,

s/ H. Elliot Wales
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New York, N.Y. 10007

April 20, 1972

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 514—September Term, 1971.

(Argued February 4, 1972 Decided March 28, 1972.)

Docket No. 71-2053

UNITED STATES OF AMERICA,

Appellee,

v.

PHILIP BENTER,

Appellant.

Before:

ANDERSON and OAKES, *Circuit Judges,*
and CLARIE, *District Judge.**

Appeal from a judgment of conviction for conspiracy, 18 U.S.C. §371, to commit bribery as a United States Government employee in violation of 18 U.S.C. §201(c), after a trial before Leo F. Rayfiel, *Judge*, and a jury in the Eastern District of New York.

Affirmed.

H. ELLIOT WALES, New York, New York, *for Appellant.*

EDWARD R. KORMAN, Assistant United States Attorney, Brooklyn, New York (Robert A.

* Of the District of Connecticut, sitting by designation.

Morse, United States Attorney for the Eastern District of New York, David G. Trager, Assistant United States Attorney, on the brief), *for Appellee.*

OAKES, *Circuit Judge:*

This appeal is from a jury conviction in the Eastern District of New York, Leo F. Rayfiel, Judge, for conspiracy (18 U.S.C. §371) to commit bribery as a United States Government employee, in violation of 18 U.S.C. §201(c). Appellant's principal claim is that he was prejudiced by the Government's summation, which included numerous references to him as "Honest Phil." At the close of the Government's case all eleven of the substantive counts charging receipt of bribes were dismissed for improper venue, since the bribes were paid in Maryland.

The heart of the case involved weighing the credibility of appellant, a long-time military contract specialist at Edgewood Arsenal, Maryland, against that of four Government witnesses—Barry and Leo Tepfer, the principals of a Government contractor (S. Tepfer & Sons, Inc.), Selig Chervin, the contract administrator for the Tepfer firm, and Jerome Migdal, a friend of appellant's and an acquaintance of Chervin. For testifying against Benter the Tepfers received formal immunity from prosecution; at the time of trial Chervin was still in business and Migdal was still a Post Office employee. The Government's proof—sufficiency isn't argued here—was that the Tepfers ultimately agreed to pay appellant $100,000, of which he received at least $44,500,[1] for his assistance in obtaining and meeting for S. Tepfer & Sons the obligations of contracts worth several million dollars.

1 Chervin and Migdal also received some of the bribe money unbeknownst to the Tepfers.

In the Eastern District of New York the practice on closing argument is for the defense to open and the prosecution to close.[2] Accordingly, we have examined the final arguments of both counsel to determine the extent, if any, to which the prosecution was provoked by the defense into making shorthand characterizations and insinuations that —unprovoked—would be improper and prejudicial. *See Viereck* v. *United States*, 318 U.S. 236, 247-48 (1943); *Berger* v. *United States*, 295 U.S. 78, 88-89 (1935); *Hall* v. *United States*, 419 F.2d 582 (5th Cir. 1969) (2-1 decision); *cf. United States* v. *Isaza*, Docket No. 71-1550 (2d Cir. Jan. 19, 1972) (slip opinion 1429).

At the outset of defense counsel's summation, he referred to the Government witnesses as follows:

> Were any of them prosecuted?
>
> No, of course not. They all got away and they decided that they would get together, and the real conspiracy was an agreement to throw Phil Benter to the wolves, these four crooks. This was the real agreement.

Counsel also referred to them as "these evil people" and said " . . . these crooks who testified for the Government were not good liars and they tripped themselves up here and there." He went on to say that the Government was "stuck with these four crooks and they have founded their case on the weak, shifting sands of these four."

The structure of his argument was to analyze the story of each Government witness. Chervin was said not to have remembered "the story that they cooked up" and to be "[a] man who admits that he is a crook." Leo and Barry Tepfer

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2 Preliminarily, it should be noted that appellant did not object to the prosecution argument as it was being made. This is attributed by appellant to the trial judge's direction to counsel "not to interrupt the other's summation." What the court did ask, however, was that there be no interruption "unless there is the clearest of provocation for it." Evidently trial counsel thought such provocation lacking.

were said to be "poor liars." Leo was characterized as "this evil man [who] takes his young son and brings him into this conspiracy"; Barry was depicted as "an admitted co-conspirator and a crook here." Again, "the crooks here are basically Chervin, the two Tepfers, and Migdal and nobody else."

Defense counsel emphasized that appellant "didn't have to testify," had spent 28 years in Government service with an "unblemished record," and had "received awards." He suggested that the motives of the Government's witnesses were "to protect themselves and at the same time pick on a man who made it tough for them." Finally, counsel argued: "These crooks—all these crooks got away with it, and Phil Benter has to stand the brunt of this trial .... The Government's case is based on the story of these four miserable crooks. You have heard the defense. You heard all these clean people on the defense side. You heard Phil Benter, who has an absolutely unblemished record." The record discloses an effective and well-structured argument. What it does not disclose to appellate eyes is its impact on the jury, but one can surmise that the impact was not inconsiderable. The "art of advocacy" was well displayed.

Government counsel replied in kind, doubtless in the view that defense counsel's argument had made significant inroads into a compelling mound of evidence against appellant. This evidence included not only direct testimony from the "Government four" but also inference-producing proof, *inter alia*, that shortly after the continuing series of payments to Benter was commenced, he and his wife opened a safe deposit box to which they made 13 trips in 18 months, the last of which was just after Migdal said he told Benter of a visit from an FBI agent; that during this time Benter and his wife purchased several luxury items including jewelry, a mink cape and a third car (for which Benter paid $2,500 cash); and that Benter falsely

stated to the jury that he had paid for the third car "with my son's money," a statement which was directly refuted at trial by his son.

The Government replies—objected to after, but not during, the summation—consisted in the main of two lines of argument, neither put in such a way as to be unobjectionable. First, counsel stated that if the jury thought "for one minute that this is a frame, that the United States Attorney's office and the FBI got together with the so-called four crooks and paraded them in here to frame this defendant, you should acquit him."[3] Secondly, he mocked the defense argument that "honest Phil Benter" is "the only one who told the truth." In this respect, the prosecutor made at least nine separate references to "Honest Phil."

The references to a "frame," while hardly expressed in language appropriate to the proper exercise of the prosecutorial function—which it will be remembered is not to win a case, but to see that justice is done—did serve to put, as appellant claims, the prestige of the United State Attorney's office and the FBI behind the Government's case. Ordinarily this is improper. *See United States* v. *Puco*, 436 F.2d 761, 762 (2d Cir. 1971) (2-1 decision). Here, however, the defense brought this line of argument on itself by the summation recounted above and particularly by the following unmistakable suggestion:

> What about the other two? Chervin and Migdal. Well, they denied they got immunity, but you saw them here and they admitted they had not been indicted; no charges have been filed against them. They have not been prosecuted. Nothing has happened.

---

3 Again, ". . . if they all got together with us, and I mean the United States Attorney, and with the FBI, to frame him, well, then go ahead and acquit him." Or, in a similar vein, "Everybody is a liar and this is one big frame."

Chervin is still in business, Migdal is still working for the United States Government as a mailman.

You can decide for yourselves whether or not there is an agreement.

They won't be prosecuted; they haven't been.

The above defense point insinuated that there was an agreement between the Government and Chervin and Migdal for them to testify and, by implication, the plentiful references to the Government's witnesses being "crooks" and "poor liars" constituted a charge that there was a "frame" of the defendant.[4] To this argument by inference the Government was entitled to reply and, as Judge Goodrich put it, ". . . some latitude must be given to lawyers' language in a hard fought case." *United States* v. *Kravitz*, 281 F.2d 581, 586 (3rd Cir. 1960), *cert. denied*, 364 U.S. 941 (1961) (footnote omitted). The form in which the reply is cast, if not objected to, generally is not plain error. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-39 (1940); *United States* v. *Isaza, supra*, slip opinion at 1433.

But the numerous references to "Honest Phil"[5] are a horse of a different color. To be sure, the defense was that appellant had told the truth, and appellant, the evidence showed, had lied in one clear instance. But a federal court prosecution does not call for the flinging of first-name epithets at a defendant that might be commonplace in a second-rate movie or television script. This ~~is playing at being a prosecutor and~~ is beneath the dignity of the United States Attorney's office and of the United

4 This is, of course, a proper but risky defense argument. For an example of a highly successful defense argument along this line, see Clarence Darrow's argument in the *Kidd* case (1898) in *Somewhere There Is a Conspiracy*, in Attorney for the Damned 267 (A. Weinberg ed. 1957).

5 There was also a reference to "[a]ward-winning Benter."

States as a sovereign.[6] "Cases brought on behalf of the United States should be conducted with a dignity worthy of the client." *United States* v. *Sober*, 281 F.2d 244, 251 (3rd Cir.) (Biggs, *C.J.*, and Hastie, *J.*, concurring), *cert. denied*, 364 U.S. 879 (1960).

We do not find justification for the prosecutor's remarks in the case law. *United States* v. *Nowak*, 448 F.2d 134, 140-41 (7th Cir. 1971), *cert. denied*, 40 U.S.L.W. 3330 (U.S. Jan. 17, 1972), cited to us by the Government, is authority only for the general proposition that "[a]n advocate is permitted considerable latitude in replying to his opponent's arguments." *United States* v. *Fortney*, 399 F.2d 406, 408 (3rd Cir. 1968), upheld the trial court's ruling that the "unfortunate" remark of Government counsel in summation that "[t]he defendant wants the jury to infer that some other thief took the money" was a slip of the tongue. In *United States* v. *Medlin*, 353 F.2d 789, 795 (6th Cir. 1965), *cert. denied*, 384 U.S. 973 (1966), Government counsel's references in closing to Judas Iscariot and Benedict Arnold were not construed by the court as references to the defendant. Calling defense witnesses liars, even though provoked by the claim that the prosecution had been instituted in bad faith, fell "just short" of reversible error in *United States* v. *Sigal*, 341 F.2d 837, 845 (3rd Cir.), *cert. denied*, 382 U.S. 811 (1965), and should have prompted, according to the court, a "stern" rebuke by the trial judge who is, after all, responsible for seeing to it that a dignified and fair trial takes place.

True, references to defendants as "crooks," "germs" and "viruses" were held not prejudicial in *United States* v. *Wolfson*, 322 F. Supp. 798, 827 (D. Del. 1971) (and see cases collected at 826-27). True also, this court has not

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6 We are advised by the briefs that the particular prosecutor involved is no longer with the office of the United States Attorney and has returned to the local prosecution office from which he came.

reversed convictions on the basis of a prosecutor's epithets in *United States* v. *Guidarelli*, 318 F.2d 523, 525 (2d Cir.), *cert. denied*, 375 U.S. 828 (1963) ("leech"), or *United States* v. *Walker*, 190 F.2d 481, 484 (2d Cir.), *cert. denied*, 342 U.S. 868 (1951) ("a type of worm"). However, none of those cases involved the repeated and persistent kind of prosecutorial misconduct that has been condemned in such cases as *Hall* v. *United States*, *supra* at 587 ("hoodlum"), and *Getchell* v. *United States*, 282 F.2d 681, 690-91 (5th Cir. 1960) (16 references to "con man" and other jargon). *See also Volkmor* v. *United States*, 13 F.2d 594, 595 (6th Cir. 1926).

We think the prosecutor's conduct was improper but in the circumstances of this case it did not constitute reversible error because there was ample evidence to justify conviction and Benter had indeed lied in reference to the payment for his third car.

We are reminded in summation cases that repeated rebukes of the prosecution by an appellate court without reversal may ultimately become "an attitude of helpless piety," and our "deprecatory words . . . purely ceremonial." Frank, *J.*, dissenting in *United States* v. *Antonelli Fireworks Co.*, 155 F.2d 631, 661 (2d Cir.), *cert. denied*, 329 U.S. 742 (1946). We trust that the rebukes in *United States* v. *Isaza*, *supra*, and here, however, will not go unheeded by the prosecutorial staff involved, for another time the evidence of guilt may be less convincing and the likelihood of prejudicial error correspondingly higher.

Appellant's other points are without merit. The cross-examination of a character witness as to his personal opinion of the character of the accused was not objected to at the trial and is not plain error. *Compare Michelson* v. *United States*, 335 U.S. 469 (1948), *and* Annot., 47 A.L.R. 2d 1258 (1956), *with* the proposed Federal Rules of Ev-

idence, 51 F.R.D. 348 (1971), Rule 405(a). Cross-examination of the witnesses Chervin and Migdal was not unduly limited in reference to their so-called life style, since there was considerable evidence showing that they had participated in the scheme and profited materially by it. *United States* v. *Smolin*, 182 F.2d 782, 786 (2d Cir. 1950), is an effective answer to the argument that, since the substantive crime necessarily involves a concert of action, there can be no conspiracy charge, *United States* v. *Sager*, 49 F.2d 725, 727 (2d Cir. 1931), for here the agreement involved more participants than were necessary for the commission of the substantive offense. Moreover, the substantive counts were dismissed after jeopardy attached.

Judgment affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1390

PHILIP BENTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a trial by jury in the United States District Court for the Eastern District of New York, petitioner, an employee of the United States, was convicted of conspiracy to commit bribery in his official capacity, in violation of 18 U.S.C. 371, 201(c).[1] He was sentenced to imprisonment for eighteen months. The court of appeals affirmed (Pet. App. 1a-9a).

In 1967, the firm of S. Tepfer and Sons, a Long Island arms and munitions manufacturer, had lost several contracts with the Edgewood Arsenal, Mary-

[1] At the close of all the evidence, the court dismissed the eleven substantive counts on the ground of improper venue (Tr. 1102-1107).

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land. Co-conspirator Chervin, the company's contracts manager, related his problem to co-conspirator Migdal, a postal employee who worked part time for a company with which the Tepfer Company had business dealings. Migdal suggested that Chervin get in touch with petitioner, a contract specialist at the Edgewood Arsenal (Tr. 6, 123–124).

At Chervin's request, Migdal discussed with petitioner whether he would be interested in helping out the Tepfer company for a fee. At first petitioner was non-committal, but, after meeting with Chervin and Migdal, petitioner agreed to help the Tepfer company on its negotiated contracts for part of a commission of 5%, which the conspirators agreed was to be divided equally among petitioner, Migdal and Chervin (Tr. 15–16, 501–505). Chervin obtained the approval of Leo Tepfer to the 5% commission, but did not reveal that he and Migdal were sharing in it (Tr. 306, 355–357, 445).

The 5% commission was later renegotiated and replaced by $100,000 for petitioner (Tr. 75–77, 83). Various payments to petitioner were made—$2,500 by Migdal (Tr. 28–30, 516–518), $22,000 by Chervin (Tr. 144), and some half dozen payments by Leo Tepfer (Tr. 303, 312–313, 315). Cancelled checks and registration records at the Hilltop Inn, where a number of the payments to petitioner were made, corroborated the oral testimony of Chervin, Migdal, Tepfer and Tepfer's son. During the period when the payments were being made, petitioner made large purchases of luxury items (Tr. 839–842, 860–864).

Petitioner explained the purchase in cash of a third family car by saying that he bought it for his son with his son's money (Tr. 772–773). The son testified that the car was purchased for him, but not with his money, and that he had later repaid his father (Tr. 1093–1094).

1. Petitioner's counsel, in closing argument to the jury,[2] explained the testimony of the four co-conspirators as a "frame" to cover their own criminal conduct. In the language of counsel, these witnesses were "stealing" (Tr. 1126, 1129, 1130); were "liars" (Tr. 1120), "evil men" (Tr. 1133), and "crooks" (Tr. 1119, 1121, 1126, 1131, 1134, 1135, 1137, 1138, 1143, 1157, 1160, 1161, 1162, 1163, 1164). On the other hand, counsel had only the highest praise for petitioner as a devoted family man of honesty and integrity, who had served his country well, saving it millions of dollars by his work at the Edgewood Arsenal (Tr. 1143–1144, 1158–1159). He closed with the argument that (Tr. 1164):

> The government's case is based on the story of these four miserable crooks. You have heard the defense. You heard all these clean people on the defense side. You heard Phil Benter, who has an absolutely unblemished record. Not only that he has never been convicted, but outside of this case he has never been charged with a crime.

In response, government's counsel repeatedly referred to petitioner as "Honest Phil," and stated that

[2] In the Eastern District of New York the defense makes the first closing argument, followed by the prosecution (Pet. 3a).

if the jury thought that the prosecution's case was a "frame," they should acquit him. The court of appeals was of the opinion that the references to a "frame" were undignified and in the ordinary case, improper. It held, however, that they had been invited by the defense argument (Pet. 5a–6a).

As to the references to petitioner as "Honest Phil," the court below strongly condemned the prosecutor "for the flinging of first-name epithets at a defendant that might be commonplace in a second-rate movie or television script." It believed that these references were "beneath the dignity of the United States Attorney's office and of the United States as a sovereign" (Pet. 6a–7a). The court concluded, however, that "in the circumstances of this case it did not constitute reversible error because there was ample evidence to justify conviction and Benter had indeed lied in reference to the payment for his third car" (Pet. 8a).

This ruling was proper in the circumstances of this case. We, of course, agree that the United States Attorney should have resisted the temptation of being drawn into such arguments. *United States* v. *Medina*, 455 F. 2d 209 (C.A. 1). The evidence showed, however, that petitioner, a trusted employee of the government in a sensitive position, had illegally obtained a substantial amount of money from betrayal of that trust. There was little to support the defense claim that his former confederates, who had paid the bribe, had concocted the tale that petitioner had received a bribe. Accordingly, while the "Honest Phil" reference was unfortunate, in light of defense counsel's argument

(see Pet. App. 3a–6a) and the evidence there is no reason to overrule the court of appeals on its disposition of the case.[3]

2. Petitioner urges that he could not be convicted for conspiracy to violate 18 U.S.C. 201(c), because concert of action is always necessary in a bribery offense, citing *United States* v. *Sager*, 49 F. 2d 725, 727–728 (C.A. 2). The court of appeals correctly dealt with this claim by pointing out that there were more participants than were necessary to the commission of the substantive offense. The conspiracy in this case did not simply involve the payer and receiver of a bribe. On the contrary, co-conspirator Migdal was initially an intermediary who was compensated for his efforts by receiving a portion of the bribe money. See *United States* v. *Smolin*, 182 F. 2d 782, 786 (C.A. 2). In addition, as Mr. Justice Holmes observed in *United States* v. *Holte*, 236 U.S. 140, 145:

> But a conspiracy with an official or employee of the government or any other for an offense that only he could commit has been held for many years to fall within the conspiracy section * * *.

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[3] Petitioner's counsel complied fully with the court's request that counsel not interrupt the summations "unless there is the clearest of provocation for it" (Tr. 1116). Petitioner's contention that he was thus handicapped from objecting to the government argument is untenable. It is more likely that he refrained from objecting because his own presentation would have placed him in a position of ridicule before the jury since he had earlier referred fifteen times to those who had testified for the government as "crooks."

See also *May* v. *United States*, 175 F. 2d 994, 1003-1004 (C.A.D.C.), certiorari denied, 338 U.S. 830. Moreover, no problem of double punishment is involved in this case—the difficulty sought to be obviated by the *Sager* ruling—since the substantive counts were dismissed after jeopardy had attached.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1972.

U.S. GOVERNMENT PRINTING OFFICE 1972